12-1900-13145-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Proposed Amendments to Rules Governing Prevailing Wages: Trucking, Minnesota Rules, Chapter 5200.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

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The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on November 8 and 9, 2000, at the State Office Building, Saint Paul, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 to hear public comment, to determine whether the Department of Labor and Industry (Department or DLI) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether any modifications to the rules proposed by DLI after initial publication are substantially different from the rule as published in the State Register.

DLI was represented at the hearings by Richard L. Varco, Jr., Assistant Attorney General, Suite 200, 525 Park Street, St. Paul, Minnesota 55103-2106. Michael Sindt, Assistant Attorney General, Suite 200, 525 Park Street, St. Paul, Minnesota 55103-2106, appeared on behalf of the Department of Transportation (Mn/DOT). The Department's Panel consisted of Doug Weiszharr, Deputy Commissioner and Chief Engineer at Mn/DOT, Roslyn Wade, Assistant Commissioner at DLI, Erik Oelker, Senior Labor Investigator at DLI, William A. Bierman, Jr., Attorney at DLI; Hope Jensen, Attorney at Mn/DOT, Charles Groshens, Labor Investigation Supervisor at Mn/DOT, Don Orgeman, Contract Administration Engineer at Mn/DOT, Kris Schulze, Management Analysis at Mn/DOT, Joel Williams, Estimates Engineer at Mn/DOT, Eugene Fredrick, Estimates Engineer at Mn/DOT, and David Berry, Statistician and Economist at DLI. Approximately 65 people attended the hearing, 47 of whom signed the hearing register. The hearing continued until all interested persons had an opportunity to be heard.

The record remained open for the receipt of written comments for 20 calendar days following the last day of hearing, through November 29, 2000. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on December 6, 2000, the rulemaking record closed for all purposes.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt a final rule or modify or withdraw its proposed rules. If DLI

makes changes in the rules other than those recommended in this Report, it must submit the rules with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of final rules, DLI must submit them to the Revisor of Statutes for a review of the form of the rules. DLI must also give notice to all persons who requested to be informed when the rules are adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On September 6, 2000, DLI requested the scheduling of a hearing and the prior approval of the Additional Notice Plan. DLI filed the following documents with the Chief Administrative Law Judge:

   a. A copy of the proposed rules certified by the Revisor of Statutes.

   b. The Notice of Hearing proposed to be issued.

   c. The Statement of Need and Reasonableness (SONAR).

2. On September 11, 2000, DLI's Additional Notice Plan was approved.[1]

3. On September 1 and 28, 2000, DLI mailed the Notice of Hearing and a copy of the proposed rules to all persons and associations who had registered their names with DLI for the purpose of receiving such notice,[2] members of the Prevailing Wage "Trucking Issues" Rules Advisory Committee, 74 identified construction contractors, 55 identified construction workers, and persons and entities on Mn/DOT's official rulemaking list.[3] DLI also posted the Notice of Hearing and the SONAR on the agency website, at www.doli.state.mn.us/laborlaw.html.

4. Over the period from September 5 to October 2, 2000, DLI delivered copies of the Notice of Hearing, proposed rules, and SONAR to 29 legislators identified as authors of the statutes related to the proposed rules, policy and budget committee chairs whose committees have oversight over DLI or Mn/DOT, and other legislators who requested such notice.[4]

5. On October 2, 2000, the Notice of Hearing and a copy of the proposed rules were published at 25 State Register 772.

6. At the hearing, DLI placed the following documents in the record:

   a. DLI's Request for Comments on the proposed rules published on July 26, 1999, at 24 State Register 149.[5]

b. A copy of the proposed rules certified by the Revisor of Statutes.[6]

c. The Statement of Need and Reasonableness (SONAR).[7]

d. A copy of the transmittal letter showing that DLI sent a copy of the SONAR to the State Legislative Reference Library and notified the Legislative Reference Librarian of the rulemaking.[8]

e. The Notice of Hearing as mailed and as published in the State Register.[9]

f. The Certificate of Mailing the Notice of Hearing and Certificate of Mailing List.[10]

g. The Certificate of Giving Notice by Mail Pursuant to the Notice Plan.[11]

h. Written comments on the proposed rules received by DLI.[12]

i. Copies of court decisions cited in the SONAR.[13]

j. Transcripts of the Prevailing Wage "Trucking Issues" Rules Advisory Committee meetings of October 20, 27, and November 5, 1999, along with exhibits.[14]

k. Documents supporting the base calculations used to estimate the cost effect of the proposed rules discussed in the SONAR.[15]

l. Certificate of Sending Notice to Legislators.[16]

m. The Report of the Administrative Law Judge in the 1998 rulemaking involving truck rental rates.[17]

n. The approval of the Administrative Law Judge of DLI's proposed Notice Plan.[18]

All documents were available for inspection at the Office of Administrative Hearings from the date of their filing to the date of this Report.

Statutory Authority

7. The proposed rules deal with implementation of the Minnesota Prevailing Wage Law (MPWL), Minn. Stat. §§ 177.41 – 177.44. In particular, the purpose of the proposed rules is to clarify the meaning of certain terms in those statutes involving trucking of materials to construction sites.[19] DLI claims general and specific statutory authority to adopt these rules under Minn. Stat. §§ 175.171(2), 177.43, subd. 4, and 177.44, subds. 3 and 4.[20]

8. Minn. Stat. §175.171(2) grants DLI the authority:

> . . to adopt reasonable and proper rules relative to the exercise of its powers and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings . . .

Section 177.43, subd. 4, directs DLI to determine prevailing wage rates for all trades and occupations on state-funded construction projects other than highway projects (commercial projects); and section 177.44, subds. 3 and 4, directs DLI to investigate and define the classes of labor and prevailing wage rates for highway construction projects. The proposed rules deal with both highway construction and commercial construction.

9. The Aggregate Ready Mix Association of Minnesota (ARM) argues that the proposed rules must be limited to application of Minn. Stat. § 177.44, subd. 2, saying that DLI is attempting to broaden the MPWL by rule, and admits to doing so in the SONAR.[21] While there are Findings below that DLI has misinterpreted certain language of the statute, DLI's statements in the SONAR are that the coverage of the law will be expanded to what the law intended, not that the law has been expanded.

10. The subject matter of the rules falls squarely in the scope of the cited statutes. DLI has the statutory authority to adopt these rules.

Standards for Adoption

11. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of the facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences. DLI has prepared a Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, DLI primarily relied upon the SONAR as its affirmative presentation of the need and reasonableness for the amendments. The SONAR was supplemented by the comments made by DLI and Mn/DOT at the public hearing and in DLI's written post-hearing submissions file November 26 and December 6, 2000.

12. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary. Minnesota case law has equated an unreasonable rule with an arbitrary rule. Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. A rule is generally found to be reasonable if it is related rationally to the end sought to be achieved by the governing statute. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." An agency is entitled to make choices between possible approaches as long as the choice it makes is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-

making discretion of the agency. A rule cannot be said to be unreasonable simply because a more reasonable alternative exists, or a better job of drafting might have been done. The question is rather whether the choice made by the agency is one that a rational person could have made.

13. In addition to need and reasonableness, the Administrative Law Judge must assess whether the Legislature has granted statutory authority to the agency, whether the agency has complied with proper rule adoption procedures, whether the rule grants impermissible discretion to agency personnel, whether the rule is unconstitutional or illegal, whether the rule constitutes an improper delegation of authority to another entity, or whether the proposed language is impermissibly vague.

14. This Report attempts to discuss the portions of the proposed rules that received significant critical comment or otherwise require examination. Accordingly, this Report will not discuss each proposed rule, nor will it respond to each comment that was submitted. Persons or groups who do not find their particular comments referenced in this Report should know that each and every submission has been read and considered. Moreover, because some of the proposed rules were not opposed, and were adequately supported by the SONAR, a detailed discussion of each word of the proposed rules is unnecessary. The Administrative Law Judge finds specifically that DLI has demonstrated the need for and reasonableness of provisions of the rules that are not discussed in this Report, that such provisions are within DLI's statutory authority noted above, and that there are no other problems that prevent their adoption.

15. Where changes were made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally. Unless mentioned specifically, any language proposed by DLI which differs from the rule as published in the State Register and is not discussed in this Report is found not to be substantially different.

Cost and Impact of the Rule Proposals

16. Minn. Stat. § 14.131 requires an agency seeking to adopt or amend its rules to explain, in its SONAR, whom the rules will affect, how they will be affected, and what other approaches were considered. Specifically, DLI must include its SONAR:

a. A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

b. The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rules and any anticipated effect on state revenues;

c. A determination of whether there are less costly or less intrusive methods for achieving the purpose of the proposals;

d. A description of any alternative methods for achieving the purpose of the proposed rule that were considered seriously by the agency and the reasons why they were rejected in favor of the proposals advanced;

e. The probable costs of complying with the proposed rules; and

f. An assessment of any differences between the proposed rules and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

DLI thoroughly addressed each of those factors in the SONAR.[22]

17. The standards to be applied in assessing procedural defects are set out in Minn. Stat. § 14.15, subd. 5, which states:

> Subd. 5. **Harmless errors.** The administrative law judge shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule if the administrative law judge finds: (1) that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

Statutory and Regulatory Background

18. The history of the MPWL and attempts by DLI and Mn/DOT (the Departments) to implement and enforce it are described in the SONAR.[23] Briefly, in 1973 Minnesota enacted its own prevailing wage law patterned after the Federal Davis-Bacon Act and the Wisconsin Prevailing Wage Law. The Minnesota Legislature determined it to be "in the public interest that public buildings and other public works be constructed and maintained by the best means and highest quality of labor reasonably available and that persons working on public works projects be compensated according to the real value of the services performed." Therefore, the Legislature declared it to be the state's policy "that wages of laborers, workers and mechanics on projects financed in whole or in part by state funds should be comparable to wages paid for similar work in the community as a whole."[24]

19. According to the SONAR, the MPWL is designed to ensure that the government, by awarding very large contracts to the lowest bidder, does not undercut and drive down the wages in the community and destabilize local labor markets. Thus all employees who perform "work under the contract" are required to be paid prevailing wage rates regardless of the entity that employs them.[25]

20. While it has been implemented for most workers, the MPWL has not been implemented for many truck drivers making deliveries to state-funded projects because of disputes about the MPWL requirements in that area.

21. The impact of the failure to implement the MPWL for truck drivers was illustrated during Prevailing Wage Advisory Committee meetings in 1999. Truck drivers testified that they should be paid similarly to a contractor's employee drivers doing the same work. For example, one driver stated that he was paid $12.00 per hour, which was $12.00 less than what those being paid the prevailing wage rate were making on the same public works project. The driver testified that this results in a "bad work environment" because drivers do not have their minds on their jobs, but on "how much they are getting ripped off." He also stated that drivers often are forced to put in long hours to make up for the low pay, resulting in an increase in construction accidents and making Minnesota roads less safe. Other drivers pointed out that they count on unemployment in the off season, but because unemployment and social security benefits are set on the basis of the wages they are paid, they are hurt a second time in the off season.[26]

22. The first administrative rules applying the MPWL were promulgated in 1977. They defined the classes of labor to which the MPWL applies as the typical construction worker classes of laborers: power equipment operators, truck drivers, and special crafts. The rule also set procedures for determining the prevailing wage rates.[27]

23. In 1988, DLI promulgated truck rental payment rules. Those rules set procedures for determining the truck rental rate for independent truck owner-operators (ITOs). They were used for only two years, due to various legal challenges and an injunction issued in the *L & D Trucking Inc.* case. Ramsey County District Court File No. C5-90-1135.

24. A major focus of these rule is Minn. Stat. § 177.44, subd. 2, which applies to highway construction projects and reads as follows:

> Subd. 2. **Applicability.** This section does not apply to wage rates and hours of employment of laborers or mechanics engaged in the processing or manufacture of materials or products, or to the delivery of materials or products by or for commercial establishments which have a fixed place of business from which they regularly supply the processed or manufactured materials or products. This section applies to laborers or mechanics who deliver mineral aggregate such as sand, gravel, or stone which is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle. [28]

In this report, the first sentence will be called the "Commercial Establishment Exception." The second sentence will be called the "Incorporated into the Work Exception" and has also been called the "exception to the exception." The attempted enforcement of these exceptions has created many disputes.

25. These proposed "truck rules" are the result of an initial attempt at rulemaking conducted by DLI in 1989 and 1990. The rulemaking process proceeded through an advisory committee drafting stage, but the rules were never officially published. The original advisory group met over a period of five months and with staff

assistance developed a draft set of proposed rules. The 1990 draft rules have been the basis for various discussions between and among the various affected parties up to and including the current rulemaking process.

26. In 1995, representatives of labor organizations, contractors associations, and city and county associations were invited by the Departments of Labor and Industry and Transportation to participate in open-forum meetings. The forums were designed to allow members to express concerns and problems associated with the wage determinations, to provide input and ideas for modifying the current rules, and to formulate a prevailing wage committee made up of representatives of the construction industry. This Prevailing Wage Committee held a series of open-forum meetings beginning on May 24, 1995 and concluding on August 16, 1995. The purpose of the Committee was to discuss issues that were common to all affected organizations and to develop a consensus on how to modify Prevailing Wage Determinations, parts 5200.1000 to 5200.1120, in a manner calculated to make the determinations more complete, more uniform, and more reflective of the wages actually paid to workers in the various areas of the state. This 1995 Prevailing Wage Committee included representatives from the Minnesota State Building and Construction Trades Council, the International Brotherhood of Teamsters Construction Local 221, the Laborers District Council of Minnesota and North Dakota, the International Union of Operating Engineers Local 49 (Local 49), the Christian Labor Association, the Association of General Contractors, the Associated Builders and Contractors, the Association of Women Contractors, and the National Association of Minority Contractors. Representatives from the Minnesota County Engineers Association, the Minnesota City Engineers Association, and the Minnesota Laborers Employers Education Trust were also invited to participate in the committee meetings.

27. A subcommittee was formed from the 1995 committee with the addition of the Association of Ready Mix Contractors, to see if there was any common ground on trucking issues. The Committee could not reach a consensus on the “truck rules” after three meetings, so that aspect of the rulemaking was postponed.

28. DLI and Mn/DOT have been involved in several lawsuits involving the MPWL. Several of these cases found unpromulgated rulemaking by one or both of the departments. The original case, *Sa-Ag, Inc. v. Minnesota Department of Transportation*, 447 N.W.2d 1 (Minn. App. 1989), resulted in a restraining order enjoining Mn/DOT from applying an unpromulgated definition of “substantially in place.” In *L & D Trucking, Inc.*, Ramsey Count District Court, File No.: C5-90-1135, Mn/DOT was enjoined from use of an unpromulgated definition of “work under the contract” as it applied to the truck rental rates, prior to rulemaking. In *L & D Trucking II*, Ramsey County District Court, File No.: C6-97-962, the Court, in response to a declaratory judgment to enforce the MPWL, held that Mn/DOT could not use an unpromulgated definition of “commercial establishment” prior to rulemaking.

29. However, in the unpublished Court of Appeals case of *International Union of Operating Engineers, Local 49 vs. Minnesota Department of Transportation*, Case No.: C6-97-1582 (Minn. App., Feb. 24, 1998) the Court acknowledged Mn/DOT’s

authority to enforce Minn. Stat. § 177.44 on a case-by-case basis. The Court of Appeals reaffirmed that authority in *L & D Trucking v Minn. Dept of Transportation, (L & D Trucking II)*, 600 N.W.2d 734 (Minn. App. 1999). It is the expectation in this proceeding that defining the terms used in the MPWL will provide consistent definitions and common understanding of the trucking requirements so that case-by-case enforcement actions by DLI and Mn/DOT will not be needed so often in the future.

30. On July 26, 1999, DLI published a Request for Comments on the proposed rules. The Departments, in recognition of the previous two attempts to make rules in this area, established a new advisory committee for the purpose of gathering information from the effected parties prior to a public rules hearing. The parties to this new advisory group included members of the prior group invited in 1995. The 1999 advisory group included Teamsters Operating Engineers - Local 49, Truck Brokers, Associated Builders & Contractors, Associated General Contractors, Aggregate Ready Mix Association, Southwest Regional Development Commission, Association of County Engineers, and several contractors. Meetings were held on three occasions and over 12 hours of testimony was taken. DLI considered the oral discussions and written testimony in developing the proposed rules

5200.1105 RENTAL RATES FOR TRUCKS ON PUBLIC WORKS PROJECTS

31. The definition of "prevailing wage rate" in Minn. Stat. § 177.42, subd. 6, requires that the prevailing wage rate include, for purposes of section 177.44 (highway projects), "rental rates for truck hire paid to those who own and operate the truck." Minn. Stat. § 177.44, subd. 3, states, in relevant part:

> The department shall determine the nature of the equipment furnished by truck drivers who own and operate trucks on contract work to determine minimum rates for the equipment, and shall establish by rule minimum rates to be computed into the prevailing wage rate.

32. According to DLI, the purpose of the truck rental fee is to ensure that truck owners are properly compensated both for their labor and for the use of their truck, so that they have the assets necessary to keep their equipment well maintained and safe for travel on Minnesota roadways.[29]

33. This is an existing rule to which DLI proposes some minor language improvements and one significant change. The significant amendment adds language that provides for a minimum truck broker's fee, to be set by annual survey, as a portion of the total truck rental rate. The amended truck rental rate is made up of four components: the prevailing wage, the cost of operating the truck and trailer, the cost of truck maintenance, and the broker fee. Not having a minimum amount set for the broker fee would require that the broker fee come out of resources that should be allocated for either the driver's wages or the maintenance of the truck. The propose rule recognizes that brokers provide a service to contractors and deserve to be compensated for that service.

34. It is necessary to specify a minimum charge to prevent the broker fee from acting to undercut the intended benefits of the prevailing wage system. It is reasonable to set a minimum cost for truck brokers to ensure that this cost is built into the bidding process for all bidders and to ensure that the majority of the rental rate is available for the costs of equipment maintenance and operation.

35. The Departments have chosen to apply the truck rental rate to cover not only those who both own and drive the truck, but all hired trucks, including trucks driven by the owner and those driven by the owner's employees. The broader coverage is necessary to prevent ITOs from being squeezed out of the industry by multiple truck owner-operators, known as MTOs. If only ITOs are required to be paid the truck rental rate required by the MPWL, they would be hampered in negotiating their hire rates compared to MTOs. This is because the MTOs would only be required to pay the prevailing wage rate and not the full truck rental rate on trucks operated by their employee drivers. If the truck rental rate is not applied to all hired trucks, the very people the provision was designed to protect would be harmed

36. The phrase "those who own and operate the truck," in Minn. Stat. § 177.42, subd. 2, is not clear and free of ambiguity. The term "those who own and operate" is plural, while "the truck" is singular. So, DLI's interpretation that the operators might be separate from the owner of a truck is consistent with the language of the statute. On the other hand, in interpreting statutes, "the singular includes the plural; and the plural, the singular; . . .[30] Also, Minn. Stat. § 177.44, subd. 3, refers to, "truck drivers who own and operate trucks on contract work," implying that the Legislature intended that § 177.42, subd. 2, also refer just to ITOs. On the other hand, again, § 177.44, subd. 3, is referring to the nature of equipment used and not to whom the truck rental rate is to be paid. Thus, there is a need to interpret the phrase "those who own and operate the truck," and DLI's interpretation does so reasonably.

37. DLI's interpretation actually appears in part 5200.1106, not specifically in this part. It is discussed here because DLI considered setting a percentage of the truck rental rate as the minimum charge for brokers' fees as an alternative to this rule. To avoid setting an arbitrary percentage, the Departments decided that a minimum rate could be determined by survey on an annual basis similar to the way the prevailing wage rates are established. The survey amount will then be published so that contractors will be able to determine the minimum broker cost. Anything over the minimum broker fee could be negotiated. This method will help ensure that the broker fees do not come out of the truck driver's pocket.

38. The proposed revisions to Part 5200.1105 are necessary and reasonable.

5200.1106 COVERAGE OF PREVAILING WAGE LAW UNDER MINNESOTA STATUTES 177.41 TO 177.44

39. This is a new rule part that provides the definitions and standards for implementing the MPWL. In its Response to Comments,[31] DLI submitted revisions to

its proposed rules (Revised Rules). In the Revised Rules, DLI corrected the title of this part to properly refer to Sections 177.41 to 177.44 rather than 177.43 and 177.44.

40. Diane Vinge Sorenson of L & D Trucking objected to this change saying DLI was now trying to broaden the rules to apply to federal interstate projects.[32] But application of the rules to the entire MPWL was clearly intended from the start. Moreover, since the statutes on statutory construction apply to rules,[33] and since headnotes, i.e., titles, are not considered to be part of a statute under Minn. Stat. § 645.49, the prior title did not create any particular rights. The change is necessary and reasonable and not substantial.

Subp. 1. In General

41. This subpart sets forth the basic requirement of the MPWL that the prevailing wage rate must be paid for "work under the contract." The remaining portions of the proposed rules set the standards for determining whether the work being performed is "work under the contract."

42. In the Revised Rules, DLI changed this subpart as follows:

> Subpart 1. **In general.** For purposes of [this part] parts 5200.1105 and 5200.1106 and Minnesota Statutes, sections 177.41 to 177.44, the prevailing wage rate, which includes truck rental rates, must be paid for work under the contract.[34]

43. Including part 5200.1105 within the application of the rule was clearly intended from the beginning, is an appropriate correction, and not a substantial change.

44. By using the clause, "which includes truck rental rates," this rule implies that truck rental rates apply to all public works construction projects under the MPWL. But that is not the case. As discussed above and noted by ARM,[35] truck rental rates are paid for purposes of Minn. Stat. § 177.44 only. That is the section governing public work highway projects. Truck rental rates do not apply to other state projects under Minn. Stat. § 177.43. As proposed, this rule is contrary to the statute and therefore illegal. To cure this defect the clause should be deleted or amended to read, ". . . which, for purposes of public works highway projects only, includes truck rental rates, . . ."

45. Except for the defect noted in the previous finding, this subpart, as revised, is necessary and reasonable and the change is not substantial.

Subp. 2. Definition of work under a contract or work under the contract

46. As proposed, Subp. 2 states:

> Subp. 2. **Definition of work under a contract or work under the contract.** The terms "work under a contract" and "work under the contract" have the same meaning. Work under a contract or work under the contract means all construction activities associated with the public works project, including any

required hauling activities to or from a public works project and work conducted pursuant to a contract as defined by subpart 6, item A, regardless of whether the construction activity or work is performed by the prime contractor, subcontractor, trucking broker, trucking firms, independent contractor, or employee or agent of any of the foregoing entities, and regardless of which entity or person hires or contracts with another.

47. This subpart defines "work under the contract" and "work under a contract" as equivalent terms. The terms are used interchangeably in the rules. The terms are not clear on their face and there have been very different and divergent understandings of their meaning.[36] Other terms are used occasionally in the MPWL and these rules that have the same or very similar meanings, including "project," "contract work," and "public works project." Under the proposed rule, "work under the contract" includes all construction activities, including any hauls required to remove or to deliver materials to and from the public works project. The definition includes work conducted pursuant to a public works contract, whether the work is performed by the prime contractor, subcontractor, truck broker, independent contractor, persons or entities performing the work described in proposed rule part 5200.1106, subpart 3, clauses A, B, and C, or an employee or agent of any of the above. The separate definition of "contract" incorporates the specifications of all of the bid documents and everything that is necessary to complete the project according to the public contracting agencies bid specifications, regardless of who performs the work.[37]

48. Trucking firms argue that drivers who work for them should not be included in this definition because the firms do not themselves contract with the public contracting agencies, are not listed as a subcontractor in any contract with the public contracting agencies, and Mn/DOT by policy does not approve a prime contractor's request to sublet the supply of trucks. Because they are not involved in the bidding process, are not paid on the basis of a bid item from the prime contractor's contract and do not sign contracts for the supply of trucks, they argue that they do not fall under the term "work under a contract" or "work under the contract."[38] They suggest that "work under a contract" means work under a contract entered into with the State of Minnesota, and does not cover any contract entered into subsequent to that direct bid contract with the public contracting agencies. The Departments rejected this definition because it would narrow the application of the MPWL substantially from its stated policy "that wages of laborers, workers and mechanics on projects financed in whole or in part by state funds should be comparable to wages paid for similar work in the community as a whole."[39]

49. Another argument given for a narrow interpretation of this term is that the contract covers the building of the roads, and therefore the term "work under the contract" should apply only to the actual building of the road and not to the delivery of materials to, or removal of materials from the site. Those that advocate for the adoption of this narrow definition believe that delivery and removal of materials should not be covered because delivery and removal is not literally the work of building the roads. Those that would adopt this definition argue that workers who simply deliver or remove materials to and from the site and leave it should not be covered by prevailing wage

rates unless they "actually make roads with it."[40] The Departments rejected this definition because it would narrow the application of prevailing wage laws substantially.

50. The Administrative Law Judge finds that the proposed rule is consistent with the legislative intent expressed in Minn. Stat. § 177.41, because a truck driver delivering materials to and from a construction site may reasonably be considered to be working "on the project," regardless of whom the truck driver works for. Moreover, because the MPWL contains the Commercial Establishment Exception, which is a specific exemption for certain deliveries of certain materials from certain commercial establishments, it was intended that deliveries that don't fall within the exception be covered.

51. The terms "contract," "prime contractor," and "contractor" are defined in Subp. 6, and are discussed below. However, they are most relevant to understanding the meaning of "work under the contract" and the Administrative Law Judge suggests that DLI move those definitions to this subpart to make them easier to find and apply. The existing Subp. 2. could be changed to Subp. 2. A. and the other definitions made Subp. 2. B., C., and D.

52. ARM is concerned that the broad definitions might cover an aggregate supplier who delivers tons of mineral aggregates to an asphalt or ready mix production facility under a contract with that facility not knowing the asphalt or concrete was destined for a highway project.[41] The Administrative Law Judge agrees that such a delivery should not be considered work under the contract and thinks that the proposed language would exclude it. It is not a "construction activity" associated with the contract and not hauling to or from the project site. Moreover, it would be covered by Commercial Establishment Exception.

53. The failure of Subp. 2 to mention the Commercial Establishment Exception makes it illegal and unreasonable. That is because Subp. 1 says that the prevailing wage must be paid for work under the contract, and Subp. 2 says that work under the contract means all construction activities, including all required hauling activities. That is not accurate because of the Commercial Establishment Exception, which the proposed rules do not mention until later subparts. Thus, this subpart is contrary to the statutes and illegal. The fact that the exception appears in a later subpart does not rescue this rule. Failing to alert affected parties and other readers to possible exceptions and requiring them to work unguided through a maze of exceptions and definitions makes this rule confusing, vague, and unreasonable.

54. To cure this defect, and assuming DLI makes the revision suggested above, the subpart should be modified to read as follows.:

Subp. 2. **Work under the contract.**

A. Except as provided in subpart 4, work under the contract means all construction activities associated with the public works project, including any required hauling activities to or from a public works project and work conducted

pursuant to a contract as defined by item B, regardless of whether the construction activity or work is performed by the prime contractor, subcontractor, trucking broker, trucking firms, independent contractor, or employee or agent of any of the foregoing entities, and regardless of which entity or person hires or contracts with another. The term "work under a contract" has the same meaning.

Subp. 3 Applicability

55. Subpart 3 lists situations that the Departments consider to be "work under the contract" that require payment of the prevailing wage or the prevailing truck rental rate. DLI asserts that providing examples is a way to make the proposed rule clearer and easier to understand and apply.[42] That can be true. However, when examples are used to state policies and standards, they can create confusion because readers expect policies and standards to be in operative rules and look for them there.

56. In the Revised Rules, DLI changed the introduction of Subp. 3.. as follows:

Subp. 3. **Applicability**. The following are examples of work performed in conjunction with a public works contract that is considered work under the contract and subject to the prevailing wage rate or prevailing truck rental rate, and [should] are not [be considered] limiting in nature.

57. The clause, "and subject to the prevailing wage rate or prevailing truck rental rate," is not necessary because it merely restates the Subps. 1 and 2. Moreover, it is contrary to the statute because it does not limit truck rental rates to highway projects. Therefore, it is illegal. To cure these defects, the clause must be deleted.

58. Some of the examples listed in subp. 3, are not really examples. Some are operative rules that impose standards and requirements not appearing elsewhere in the proposed rules and it may be confusing to call them examples. The Administrative Law Judge would suggest that the introduction of Subp. 3 be changed to read as follows:

Subp. 3. **Work considered to be under a contract.** Without limiting the application of parts 5200.1105 and 5200.1106 to other situations, the following are considered to be work under the contract.

Subp. 3. A. Rebating prohibited

59. In the Revised Rules, DLI changed Subp. 3. A. as follows:

A. A contractor, subcontractor, trucking broker, trucking firm, agent, or any other person contracting to do all or part of the work under a contract must pay the employee laborers, mechanics, and workers no less than the prevailing wage, and must pay truck owner-operators no less than the truck rental rate. The contractor, subcontractor, trucking broker, or other person making payment to an employee laborer, mechanic, worker, or truck owner-operator may not accept a

rebate [or reduce the regular hourly rate of pay during noncovered times of any person or entity which has the effect] for the purpose of reducing or otherwise decreasing the value of the compensation paid[, during the pay period].

60. The first sentence is another restatement of Subps. 1 and 2 and is not necessary. It must be deleted.

61. According to the SONAR, this example is necessary to prevent the undercutting of prevailing wage rates by the reduction of a employee's regular rate of pay for hours worked on other than state funded projects. This is reasonable because it prevents employers from circumventing the MPWL by offsetting an employee's pay on other jobs. Allowing such circumvention would mean the prevailing wage would subsidize the employees wages on private work and therefore distort the bidding process.[43] DLI made the changes shown above to clarify the rule and remove the reference to "during the pay period," which some of those commenting found confusing.[44] The revision was supported by ARM.[45]

62. There were claims made in the record that there have been instances of employers offsetting wages on other jobs to cover the increased costs of paying prevailing wages on public jobs. The proposed rule is necessary to prohibit that practice and does so reasonably. Subp. 3. A., as revised and without the first sentence, is necessary and reasonable and not a substantial change. However, this provision does not describe a situation that is considered work under the contract. Instead, it is a prohibition against certain payment practices. Placing it in Subp. 3 may be confusing. The Administrative Law Judge suggests that it be moved to a more appropriate subpart, such as separate subpart of its own.

Subp. 3. B. Temporary asphalt or concrete plant

63. In the Revised Rules, DLI changed Subp. 3. B. as follows:

B. Work performed by employees of a contractor or subcontractor that operates a temporary asphalt or concrete plant, as defined in subpart 6, item E, that was moved into a gravel pit or borrow pit, which meets the commercial establishment language under subpart 5, items G, H, and L, [is considered work under the contract] including the contractor's employees loading the equipment hoppers with materials obtained from the pit, is considered work under the contract and must be paid at appropriate prevailing wage rates.

64. The purpose of this rule is to clarify that when a contractor or subcontractor operates a temporary asphalt or concrete batch plant, the workers employed there are considered to be performing "work under the contract," even if the temporary plant is located in a pit that itself qualifies as a "commercial establishment" under the Commercial Establishment Exception.[46]

65. ARM points out that not all of the product from a concrete or hot mix plant at a commercial establishment may go to the highway project and that it would be

virtually impossible to identify the time spent scooping aggregate from a pit and into a hopper for a highway project.[47]

66. The resolution of this issue depends upon the meaning of "temporary" in this context. That is discussed under Subp. 6. E.

67. The final clause, "and must be paid at appropriate prevailing wage rates," is repetitive and is not necessary. It must be deleted. Otherwise, Subp. 3. B. is necessary and reasonable as revised.

Subp. 3. C. Various hauling activities

68. Subpart 3. C. is a list of six hauling activities that the Departments consider to be "work under the contract." These activities are based on actual situations investigated by Mn/DOT and are intended to ensure that drivers are paid prevailing wages for hauling both to and from the construction site when performing work under the contract.[48]

69. Subpart 3. C.(1) covers the hauling of stockpiled or excavated materials on the project work site to other locations on the same project, even if the trucks leave the work site at some point. This example was included to prevent contractors from circumventing the prevailing wage statute by having drivers drive off of the project right of way onto a regular roadway and then back on to the project right of way. The contractor would then argue that the time spent driving off of the project right of way does not constitute work under the contract.[49] Such an interpretation is inconsistent with the language of the MPWL and this rule is necessary and reasonable.

70. Subpart 3. C.(2) covers hauls from facilities that do not meet the requirements for the Commercial Establishment Exception, and the return haul, whether loaded or empty. This is reasonable.

71. Subpart 3. C.(3) covers hauls from another construction project to the public project because such sites do not meet the requirements for the Commercial Establishment Exception. This is reasonable.

72. Subpart 3. C.(4) covers hauls of any material from the public works construction site, and the return haul if empty or if loaded from other than a qualified commercial establishment. The purpose of this example is to make it clear that even if the driver works for a qualified commercial establishment, he or she must still be paid the prevailing wage rate for the hauling of materials off of the project site, because that haul is work under the contract.[50] That is a reasonable interpretation of the Commercial Establishment Exception because it refers to "delivery of materials or product by or for" the commercial establishments. Hauling materials to remove them from the project site is most likely for the contractor, not the for commercial establishment.

73. In the Revised Rules, DLI changed Subp. 3. C.(5) as follows:

(5) the delivery of materials or products by trucks hired by a contractor, subcontractor, or agent thereof, from a commercial establishment. A delivery of materials or products by trucks hired by a contractor or subcontractor, or agent [of] thereof, is considered work under the contract for which prevailing wages for employees and truck rental rates for truck owner-operators must be paid; and

74. This example was included to make it clear that a contractor's employees must be paid the prevailing wage rate even when they are delivering from a qualified commercial establishment.[51] Again, this is reasonable because only drivers hauling "by or for" a commercial establishment fall under the Commercial Establishment Exception.

75. The first sentence of Subp. 3. C.(5) is reasonable, but the second sentence is not necessary. It merely repeats the first sentence and the introduction to Subp. 3. C. To correct this defect the sentence must be deleted and the clause ", and" added to the end of the first sentence.

76. Subp. 3. C.(6) states:

(6) delivery of sand, gravel, or rock, by or for a commercial establishment, which is deposited "substantially in place," either directly or through spreaders from the transporting vehicles is work under the contract. In addition, the return haul to the off-site facility empty or loaded is also considered work under the contract. The prevailing wage rates must be paid to employee truck drivers and the truck rental rates must be paid to the truck owner-operators.

77. The first sentence repeats some of the "Incorporated into the Work Exception" language of Minn. Stat. §§ 177.43, subd. 2, and 177.44, subd. 2. It is necessary and reasonable to identify this exception here to make the rule complete.

78. The second sentence is based upon the Departments' recognition that there are two legs of each haul. It is reasonable that if the first leg is covered by the MPWL, the second leg must also be covered. Otherwise, the truck drivers could receive one rate while coming and another while going, which the Legislature could not have intended.

79. Again, the third sentence of subp. 3. C.(6) is unnecessary duplication of the introduction of the subpart and must be deleted.

80. Except as noted above, DLI has demonstrated that Subp. 3. C., as revised, is necessary and reasonable. The proposed revisions are not substantial.

Subp. 4. Work not considered to be under a contract

81. In the Revised Rules, DLI changed the opening of Subp. 4 as follows:

Subp. 4. **Work not considered to be under a contract.** The prevailing wage rate and truck rental rates are not required to be paid for the following work [which] because it is not considered to be "work ["]under a contract":

82. This subpart is intended to clarify those things that are not considered to be "work under a contract." The items included in this subpart provide additional examples applying the Commercial Establishment Exception.[52] Again it is necessary to provide examples to clarify this exception. However, it is again duplicative, possibly misleading, and unnecessary to state that the prevailing wage and truck rental rates are not required to be paid in these situations. To correct this defect, the rule should be revised to read something to the effect of:

Subp. 4. **Work not considered to be under a contract.** Without limiting the application of parts 5200.1105 and 5200.1106 to other situations, the following work is not considered to be work under a contract:

Subp. 4. A. Commercial establishment production

83. Item A item states, "the processing or manufacturing of materials or products by or for a commercial establishment." is not work under the contract. This is essentially a restatement of the first part of Commercial Establishment Exception, as opposed to the "delivery" portion. It is necessary and reasonable for clarity and completeness.

Subp. 4. B. Screening, washing, or crushing

84. In the Revised Rules, DLI changed Subp. 4. B. as follows:

B. the work performed by employees of the owner or lessee of a gravel pit or borrow pit, [which] that is a commercial establishment and that performs work in conjunction with a public works project by adding value to the sand, gravel, or rock contained in or delivered to the pit through the use of screening, washing, or crushing machines. This does not include the employees described in subpart 3, item B;

85. DLI included this item to clarify that commercial pit owners who have portable gravel machines and process mineral and aggregate for a public works project meet the Commercial Establishment Exemption. The Departments recognize that washing, crushing, and screening machines are portable and can be moved on and off of the pit site. This proposed rule is intended to protect commercial establishments by allowing for the movement of these machines without converting them to temporary plants and thereby requiring that the employees working these machines be paid the prevailing wage. This item does not include employees working directly with portable asphalt or concrete plants, because DLI believes they are required to be paid the prevailing wage.[53]

86. Subp. 4. B. is necessary and reasonable. But it does not make it clear that it applies even though these particular machines are portable. Only people with

knowledge of this machinery would know that. Therefore, the Administrative Law Judge would suggest that a sentence such as the following be inserted before the last sentence: “This applies even if the machines are portable.”

Subp. 4. C. Commercial establishment delivery

87. In the Revised Rules, DLI changed Subp. 4. C. as follows:

> C. the delivery of processed or manufactured goods to a public works project by the employees of a commercial establishment including, truck owner-operators, hired by and paid by the commercial establishment, including the delivery of sand, gravel, or rock, [which] that is stockpiled on the public works project; or

88. This item is intended to restate the delivery portion of the Commercial Establishment Exception. DLI’s intent here is to differentiate between the delivery by and for a commercial establishment for stockpiling from the deposit of materials substantially in place. This is based upon DLI’s view that if materials are not delivered for stockpiling, they must have been incorporated into the work by depositing substantially in place.

89. As found in the Findings discussing Subp. 5. E. and F., that interpretation is not consistent with the language of the Incorporated into the Work Exception in the statutes and therefore illegal. Thus, Subp. 4. C. is also illegal. To correct this deficiency, this item it should be revised to read:

> C. the delivery of processed or manufactured goods to a public works project by the employees of a commercial establishment, including truck owner-operators hired by and paid by the commercial establishment, unless it is the delivery of mineral aggregate that is incorporated into the work under the contract by depositing the material substantially in place.

In the alternative, this language could be added to Subp. 4. A. so that the entire Commercial Establishment Exception is stated in one place.

Subp. 4. D. Multiple site deliveries

90. In the Revised Rules, DLI changed Subp. 4. D. as follows:

> D. multiple site hauling operations include secondary hauling activities in addition to the hauling of materials on and off the public works project in order to complete the truck’s round trip haul. The hauling of materials or products between these secondary off-site facilities as part of a multiple site hauling operation [are] is not considered work under the contract if one of the secondary off-site facilities is a commercial establishment, as long as the time spent hauling between the secondary sites is properly documented in the trucking records and the time spent hauling on and off the project is properly compensated as [provided] required in [this subpart and] subpart 3.

91. DLI included this item to clarify that secondary hauling activities are not considered work under the contract, even though some parts of the round trip hauling would be considered work under the contract.[54] In its Post-Hearing Comments, DLI explained the revision to this item as a clarification that the "middle leg" of multiple site hauling operations is not covered if one of the secondary sites is a commercial establishment.[55]

92. It is necessary and reasonable to clarify that moving materials between non-project sites are not covered. But DLI has not explained the basis for its revision requiring one of the secondary off-site facilities to be a commercial establishment. If the leg is for a purpose not related to the project, why should it matter if it was to a commercial establishment. Moreover, this change appears to be a substantial change. Other than the phrase, "if one of the secondary off-site facilities is a commercial establishment," revised Subp. 4 D. is necessary and reasonable. The phrase must be deleted.

Subp. 5. Definition of terms

93. According to the SONAR, this subpart provides definitions used to interpret the Commercial Establishment Exception and the Incorporated into the Work Exception.[56] In the Revised Rules, DLI changed the opening of Subp. 5 as follows:

> Subp. 5. **Definition of terms.** For purposes of [this part] parts 5200.1105 and 5200.1106 and Minnesota Statutes, sections 177.41 to 177.44, the following terms have the meanings listed.

This revised rule is necessary and reasonable, and not a substantial change. However, the Administrative Law Judge would suggest that, because other subparts also contain definitions, it would be helpful if the title were changed to something like, "**Commercial establishment, exception, definitions.**"

Commercial Establishment Exception

94. Again, the Commercial Establishment Exception states:

> This section does not apply to wage rates and hours of employment of laborers or mechanics engaged in the processing or manufacture of materials or products, or to the delivery of materials or products by or for commercial establishments which have a fixed place of business from which they regularly supply the processed or manufactured materials or products.[57]

95. There is no disagreement that the term commercial establishment was meant to include a company whose main business is selling materials like sand and gravel out of its own existing gravel pits to all construction companies and other customers. There is also no disagreement that the term does not include a temporary pit opened by a construction company on land it owns or leases near its project just for the purpose of supplying materials to itself for the project. For the many situations that fall somewhere between those extremes, there are numerous disagreements. It is

necessary to provide rules to clarify the application of the Commercial Establishment Exception. In Subp. 5, there are definitions of “laborer or mechanic” (Subp. 5. A.), “commercial establishment,” (Subp. 5. L.), “fixed place of business,” (Subp. 5. G.), “regularly supply,” (Subp. 5. H.), “processed or manufactured,” (Subp. 5. I.), “materials or products,” (Subp. 5. J.), and “by or for,” (Subp. 5. K.).

Subp. 5. A. Laborer or mechanic

96. In the Revised Rules, DLI revised Subp. 5. A. as follows:

> A. “Laborer or mechanic” means [employees working for a contractor, subcontractor, or any other entity including truck owner-operators] an employee performing work under the contract.

97. According to the SONAR, this definition is necessary to ensure that all laborers and mechanics who work under the contract are paid prevailing wage whether they are directly employed by the prime contractor, or are employed by a subcontractor or any other entity.[58] Actually, this rule is not a definition of “laborer or mechanic” and does not clarify what is meant by “laborer or mechanic.” Rather, it is an attempt to state that all workers doing work under the contract are covered. But that is stated already in the MPWL and in Subps. 1 and 2. It is not necessary to state it again. In addition, the proposed rule confuses the issue by using the word “employee.” The ITOs are truck drivers, who are considered laborers or mechanics, but are not employees in the common meaning. Local 49 is concerned that using the word “employee” creates confusion and might allow the contractors to create another way to avoid paying prevailing wages.[59] Finally, as ARM points out,[60] the word “employee” as used here can easily be read to include all classes of employees, such as those in the office. That would be contrary to the MPWL, which quite clearly uses “laborer or mechanic” to mean construction laborers and trades. DLI has failed to demonstrate that the proposed rule is legal and reasonable.

98. In order to correct these defects, Subp. 5. A. must be deleted. In the alternative, it could be amended to read something similar to the following:

> A. “Laborer or mechanic” means a worker in a construction industry labor class identified in or pursuant to part 5200.1100.

Subp. 5. L. Commercial Establishment

99. The proposed rules do not provide a definition of “commercial establishments which have a fixed place of business from which they regularly supply the processed or manufactured materials or products.” The Administrative Law Judge law judge has occasionally used the term “qualified commercial establishments” in this Report to designate such commercial establishments. The proposed rules simply use the term “commercial establishment” to mean either a “commercial establishment” or a “commercial establishment which has a fixed place of business from which it regularly supplies the processed or manufactured materials or products.” As Local 49 suggests,

this is not a fatal defect, but it adds some confusion to a phrase that already needs clarification.[61]

100. There are at least two possible meanings of "commercial establishment." It may be a business entity that owns and operates a business, or it may mean a business operating at a particular location. For example, a business entity might own several stores. Under the first meaning, the business entity is the commercial establishment; under the second, each of the stores would be a commercial establishment. In the proposed rules, the second meaning is used.

101. According to the SONAR, the "commercial establishments" intended by the statute have a fixed location where they sell the product, are open to the public, and advertise the product for sale from that location. The product is advertised and is available to all buyers. Commercial establishments supply to the public and are willing and able to offer their materials and products to all buyers. Potential bidders would know the availability of the materials necessary for completion of a public works project and would be on a level playing field with regard to this bid item.[62]

102. DLI's interpretation of the statute is reasonable and gives effect to all the words in the Commercial Establishment Exception. The focus of the statute is on the fixed or temporary nature of the location from which the materials and products are delivered.

103. In the Revised Rules, DLI changed Subp. 5. L. as follows:

> L. The determination of whether a facility is a "commercial establishment" is made on a location-by-location basis and on a product-by-product basis, not on a business-wide basis. Construction projects are not considered [a] commercial [establishment] establishments. [To qualify as a] A "commercial establishment" is a business entity [must] that has not set up at the location from which deliveries are made primarily to serve the public works contract and, prior to advertisement of the public works contract, it:
>
> (1) [own] owned or [lease] leased the land on which it operates;
>
> (2) [possess] possessed business records indicating that [a majority of annual] sales from the location from which deliveries are made,[63] are for other than the contracting agency's public works contracts;
>
> (3) [demonstrate that the facility operates primarily as a material supplier rather than a contractor;]
>
> [(4) demonstrate that the establishment has not, or will not, set up at the location from which deliveries are made primarily to serve the public works contract;

(5) demonstrate that the establishment advertises] advertised the availability of material for sale to the general public and [has] had facilities available for effecting sales; and

[(6) in the case of a gravel pit or borrow pit, the establishment's location must be zoned for commercial purposes. All] (4) has acquired all necessary permits to operate from the location [must have been acquired], and met all legal obligations of state and local regulations to excavate soils, sand, gravel, or rock for the purpose of receiving something of value for the product [must have been met].

104. DLI argues that it is reasonable to require that commercial establishments be evaluated on a location by location basis because the Legislature did not intend that temporary facilities be included in the exception. Had the Legislature intended to include temporary facilities, the statute would not have specified from "a fixed place of business from which they regularly supply the processed or manufactured materials or products." Temporary facilities only available to a particular contractor should not be considered commercial establishments because they eliminate competition in the area and undercut the prevailing wage rates in the community.[64] The Administrative Law Judge agrees.

105. DLI revised this rule in response to comments at the hearing. The requirement of a majority of annual sales is removed. The requirement that the business did not set up at the location primarily to serve the public works project was moved. The requirements that the determination be made on a product-by-product basis and that the listed factors be met at the time the public works contract is advertised are added. The requirement that the facility operate primarily as a material supplier rather than a contractor is eliminated. The requirement that the location be zoned for commercial purposes is eliminated with the expectation that remaining requirements for necessary permits will cover what the Department had intended with the zoning reference.[65]

106. Local 49 suggests that the provision requiring setup "prior to" advertisement of the public works contract is too open ended and should read "prior to and at the time of."[66] That appears to have been the intent, and DLI may make that change if it desires. It would not be a substantial change. The same change should also be made to Subp. 5. G.

107. Except for the new "product-by-product" requirement, all the other revisions are necessary, reasonable, and not substantial. The "product-by-product" requirement requires more analysis. It was added in response to comments at the hearing and in post-hearing comments.

108. Again, the statute states:

This section does not apply to . . . the delivery of materials or products by or for commercial establishments which have a fixed place of business from which they regularly supply the processed or manufactured materials or products.[67]

Local 49 argues that use of the word “the” in front of “processed or manufactured materials or products,“ implies a product-by-product analysis. However, the parallel statute for commercial projects,[68] leaves out the word “the.” That language would not support such an analysis. The Legislature could not have intended there to be a substantive difference between the statutes. Beyond the statutory language, it would not be reasonable to require a detailed product analysis. The subject is gravel pits. If it is a qualified commercial establishment for a certain type of sand, it doesn't matter if the next day its starts producing large, crushed rock for the project. All the bidders on the project would have had the same opportunity to buy that rock from the producer and fashion their bids accordingly. Moreover, the accounting requirements for the producer and the contract agency would be a nightmare. ARM calls the proposal absolutely unworkable.[69] The Administrative Law Judge agrees. It would be necessary to keep time records for every worker in the pit by what type of product he or she was producing at the time.

109. Local 49 supported its support of a product-by-product analysis citing the example of a commercial establishment that produces gravel, but then moves in a temporary asphalt plant for a one highway project.[70] That particular issue is addressed by Subp. 3 B on temporary asphalt and concrete plants. The problem is that a product-by-product analysis could involve differentiating between classes of gravel. That clearly is not required.

110. DLI has failed to demonstrate that the phrase, “and on a product-by-product basis” is necessary and reasonable. It must be deleted. In all other respects, revised Subp. 5. L. is necessary and reasonable and not a substantial change.

Subp. 5. G. Fixed place of business

111. In the Revised Rules, DLI revised Subp. 5. G. as follows:

> G. To [qualify as] be a “fixed place of business,” a business entity must have a facility that is serving the government project from a location that is located at a site [which the local population considers a source of materials for public use] that served the public prior to advertisement of the public works contract. In addition, the facility must have sufficient utilities and equipment to serve the general public from the location upon demand [and must remain in the location for a minimum of one year after the project is completed]

112. According to the SONAR, this definition is necessary because this is one of the factors used to determine which businesses fall under the Commercial Establishment Exception and because there have been multiple interpretations of the term. The proposed standards are intended to distinguish a fixed business from a transient business.[71] The revisions were made in response to comments at the hearing and in written comments. ARM supports the revisions.[72]

113. This rule is necessary and reasonable for the reasons offered by DLI and the changes are not substantial. However, it is not entirely clear. The Administrative Law Judge would suggest that it be revised such as:

> G. To be a "fixed place of business," a commercial establishment must serve the government project from a location from which it served the public prior to advertisement of the public works contract and that has sufficient utilities and equipment to serve the public upon demand.

Subp. 5. H. Regularly supply

114. In the Revised Rules, DLI revised Subp. 5. H. as follows:

> H. "Regularly supply" means to furnish materials and products for sale to the general public at consistent intervals [materials and products for sale to the general public].

115. This rule was proposed to address concerns about whether outstate suppliers who don't remain open all year can be qualified commercial establishments. The Department states that it recognizes that consistent intervals may vary by the location of the business, but believes that a commercial establishment as contemplated in the statute must be one that has an on-going operation and not one that produces materials only for a particular public works project.[73]

116. There is a need for such a rule, but the language chosen is unreasonable. The core term, "furnish for sale at consistent levels" has no relevant meaning. It is unreasonably vague. To cure this defect, the Administrative Law Judge suggests that the rule be modified such as:

> H. "Regularly supply" includes supply by a commercial establishment that is closed on a seasonal basis.

Subp. 5. I. Processed or manufactured

117. Proposed Subp. 5. I. provides:

> I. "Processed" or "manufactured" means prepared or converted from raw materials by a set means, method or process, into a new form suitable for use or sale including, but not limited to, steel, cement, concrete products, and asphalt.

118. The SONAR claims it is necessary to define this term because it is one of the factors set out in the Commercial Establishment Exception and that is reasonable because it reflects the commonly recognized definition and because the Legislature did not define the term in any specialized way.[74]

119. This rule is not necessary because the statute does not use the words in any specialized way and because they are easily understood by their common meanings. Subp. 5. I. must be deleted.

Subp. 5. J. Materials or products

120. In the Revised Rules, DLI revised Subp. 5. J. as follows:

> J. "Materials" or "products" means raw or finished goods [which] that are produced by physical or mechanical labor or intellectual effort, or something produced naturally as by generation or growth.

121. DLI offered the same explanation for this rule as it did for Subp. 5. I..[75] Again, the words are sufficiently clear in the statute. Subp. 5. J. must be deleted.

Subp. 5. K. By or for

122. Proposed Subp. 5. K. provides:

> K. "By or for" means the delivery of material for a commercial establishment which meets the definition of items G, H, and L, by employees of the establishment or trucks hired and paid by the establishment to deliver its products.

123. This rule is actually defining the term, "delivery," or, more correctly, "delivery of materials or products by or for commercial establishments." According to the SONAR, this definition is necessary to provide that employees or trucks hired by a public works contractor who haul from a commercial establishment must be paid the prevailing wage rate or the truck rental rate, and that the employees or trucks hired and paid by the commercial establishment to deliver its products are not required to be paid prevailing wage.[76]

124. The meaning of the terms "delivery" and "by or for" are clear in the statute and require no further definition. The requirements for payment of prevailing wages by commercial establishments are stated elsewhere. Subp. 5. K. is not necessary and must be deleted.

Incorporated into the Work Exception

125. As noted above, the Incorporated into the Work Exception states:

> This section applies to laborers or mechanics who deliver mineral aggregate such as sand, gravel, or stone which is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle. [77]

In Subp. 5, there are definitions of "mineral aggregate" (Subp. 5. D.), "incorporated" (Subp. 5. E.), and "substantially in place, either directly or through the use of spreaders, from the transporting vehicle" (Subp. 5. F.).

Subp. 5. D. Mineral aggregate

126. Subp. 5. D. defines "Mineral aggregate." The term is used in the Incorporated into the Work Exception. This definition is necessary to ensure that there is no confusion as to what is included under the meaning of mineral aggregate. It is reasonable because DLI defined it consistent with construction industry understandings and common construction industry practices.

127. ARM states that the proposed definition excludes many products produced today by commercial suppliers of mineral aggregate.[78] As Local 49 points out, broadening the definition of mineral aggregate would broaden the application of the Incorporated into the Work Exception. Local 49 would support that because it would broaden the coverage of prevailing wages.[79] DLI may consider the change, so long as any items added may be considered "mineral aggregate."

Subp. 5. E. and F. Incorporated and substantially in place

128. As revised by DLI, Subp 5. E. and F. state:

> E. "Incorporated" means to deposit materials onto the project work area from a transporting vehicle through whatever means necessary to place the materials from the transporting vehicle over the existing or improved surface or predeposited materials at the project site.
>
> F. Mineral aggregate is deposited "substantially in place," either directly or through the use of spreaders, from the transporting vehicle if it is deposited on the project site where it may be further worked without further hauling by truck. Additionally, materials that are dumped or placed to fill behind such things including, but not limited to, retaining walls, barriers, and bridge abutments directly from the transporting vehicle without any further hauling by truck are considered substantially in place. Mineral aggregate[, which] that is deposited in a stockpile on the site of a public works project, is not considered substantially in place [on the site of a public works project]. A stockpile of mineral aggregate is a quality (sic) of mineral aggregate placed in a location for temporary storage when all or substantially all of it is to be relocated by loading and hauling it to another location for final [payment] placement.

129. These definitions implement DLI's interpretation of the Incorporated into the Work Exception that all that is required is that the materials be deposited by any means onto the project work area from a transporting vehicle. There are two different positions as to what the Legislature intended by this exception.

130. Unions and other representatives of construction truck drivers argue that once the material is deposited at the construction site and needs no further hauling by truck, it is substantially in place, even though some further work may still need to be done before it meets contract specifications. The key for them is whether additional hauling by truck is required. Only if the material is dumped and stockpiled and later requires further hauling by truck, is it not substantially in place.[80]

131. During the Advisory Committee meetings, aggregate suppliers and others argued that in order to be incorporated into the work under a contract, materials would need to be bladed, compacted, spread or somehow further worked and not just deposited. This interpretation of the statute was found to be a reasonable interpretation in *SA-AG*, where the Court stated:

> Appellants argue that "substantially in place," as set forth in the statute, is plain on its face and requires no interpretation; therefore, they claim the addendum cannot be an interpretation of the already plain statutory language. We disagree. First of all, the Department of Transportation had in fact interpreted the term "substantially in place" differently in the past. Therefore, as respondents claim, "substantially in place" appears to be subject to more than one interpretation. In addition, respondents submitted affidavits describing the process of dumping and spreading various aggregates on roadways. Evidence indicated that in many cases, about 1/10 of the total labor is taken up in transporting the materials and actually dumping them onto the roadway; the remaining 9/10 of the labor involves spreading the material onto the roadway after the hauler has entirely left the site. Thus, it appears that in many cases the process of spreading the aggregates across the roadway, i.e. putting the material substantially in place where it will remain, is a process separate and distinct from delivery and depositing of the materials.
>
> Appellants also claim the term "substantially" is plain on its face and admits of no further interpretation. See Cable Communications Board v. Nor-West Cable Communications Partnership, 356 N.W.2d 658, 667-68 (Minn. 1984) (meaning of "substantially contested" was plain on its face). Even if the term "substantially" is deemed incapable of interpretation, the more important question in this case concerns the meaning of "in place." As respondents point out, the statute does not define whether "in place" refers to when the material is sitting in a pile immediately after being deposited on the roadway, or when it is smoothed out upon the roadway and ready for further grading or compacting. We note that Section 2211.3 of the Minnesota State Highway Specifications employs the terms "placing" and "placed" in the context of depositing mineral aggregate upon roadways:
>
> > The material for each layer shall be spread and compacted to the required cross-section and density before placing aggregate thereon for a succeeding layer. The surface of each layer shall be maintained with uniform texture and firmly keyed particles until the next layer required by the contract is placed thereon or until the completed base is accepted if no other construction is required thereon.
>
> Id. (emphasis added). This provision lends further support to respondents' position that "in place" means after additional labor has been performed to smooth out the aggregate to a uniform depth.[81]

132. DLI claims that the meaning suggested by the aggregate suppliers and found apparently reasonable by the court is improperly based on Mn/DOT's payment practices to prime contractors, which is a separate subject from the payment rate for employees.[82] DLI believes that such a definition would not be reasonable because it would eliminate almost all delivered material and be inconsistent with the purpose statement in the MPWL.[83]

133. The Minnesota Construction Conference of Teamsters suggested that "substantially in place" should be interpreted according to the common meanings of the words. They state:

> Thus, common dictionary definitions of the words are helpful in defining statutory terms unless more technical definitions have been provided by the legislature. With respect to "substantially in place," "substantially" is defined to mean: "largely; essentially; in the main." Websters New Universal Unabridged Dictionary, Deluxe 2d Edition (Simon & Schuster, 1983), at P.18 17. "In place" is defined to mean: "in the customary, proper, or assigned place." Websters at P.1370. Material is substantially in place under the ordinary usage of such terms when it is largely or essentially in its assigned place. It is not necessary that the material be completely in the place where it will remain and be ready for the next layer to be placed upon it in order for it to be considered "substantially in place." It is sufficient that the material be largely in the place where it will remain in order for it to be "substantially in place," even though additional work may have to be performed on the material before the next layer of roadway may be applied. The definition specified in the proposed rule is, therefore, a reasonable one.

134. The Administrative Law Judge finds that the definitions in the proposed rules are not consistent with the language of the statutes. The words of the statutes require that the mineral aggregate be incorporated into the work. Depositing materials onto the project work area is not sufficient to qualify as incorporating them into the work. The words of the statute also require depositing the material substantially in place. That requirement is not satisfied by the material just being deposited on the project site. The words "incorporated" and "substantially" in the statute have some meaning and purpose.

135. The MPWL contains the Comical Establishment Exception and the Incorporated into the Work Exception. Therefore, the Legislature intended that the delivery of materials to a state-funded construction project by a qualified commercial establishment be exempt from prevailing wage requirements, unless the act of delivery also incorporates the materials into the work. Basically, it is a distinction between delivery by a supplier and construction by a contractor. If all that is done is to deliver the material and leave it in a pile or windrow at the site, even within a few feet of where it will end up in the road, building, or other project, it is a delivery. In order to be considered part of the construction, the material must delivered at the place and in a configuration that it will end up in the project without further significant movement. Only then would it be substantially in place. According to testimony at the hearing, the most common situation affected by this rule is the current use of bottom dump trailers to dump materials in windrows at a spot on the road bed where they still need to be spread

out by grading. A windrow is a long, thin pile of material. That sounds like delivery of materials, but if the proposed definitions are adopted, it would be work under the contract.

136. DLI's interpretation broadens the Incorporated in the Work Exception so much that it fails to give effect to the Commercial Establishment Exception. It ignores the language of the statute under the pretext of pursuing what is claimed to be the broad remedial spirit of the statute. That is contrary to Minn. Stat. § 645.16, which provides, in part:

> The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.
>
> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit . . . .

While the words of the Incorporated into the Work Exception are not clear and free from all ambiguity, DLI's interpretation is not within the range of reasonable interpretations. It is contrary to the statutes and thus Subp. 5. E. and F. are illegal. To cure this defect they must be deleted or modified to be consistent with the language of the Incorporated into the Work Exception. That language does not require much beyond just delivery. It certainly doesn't require compaction and other steps necessary to meet Mn/DOT specifications. The language, "substantially in place, directly or through spreaders," makes it clear that delivery through a spreader qualifies and that there are situations where delivery directly from the truck will qualify. Thus, a requirement that the material be delivered where it will not require reshaping or movement by grading or other mechanical means would probably be the broadest allowable interpretation of the statute. Therefore, the Administrative Law Judge suggests that Subp. 5. F. be deleted and that Subp. 5. E. be amended to read:

> E. "Incorporated into the work under the contract by depositing the material substantially in place" means the mineral aggregate is deposited on the project site where it will not require reshaping or movement by grading or other mechanical means. As used in this part, "deposited substantially in place" has the same meaning.

The last sentence was added because the quoted shorthand phrase, rather than the entire phrase used in the statute, is used in other subparts.

Other Definitions

Subp. 5. B. Truck hire

137. Subp. 5. B. defines "truck hire," which does not relate to the Commercial Establishment Exception. In the Revised Rules, DLI revised Subp. 5. B. as follows:

B. “Truck hire” means the hiring of another’s truck, tractor, or tractor-trailer for the purpose of:

(1) delivering materials to or from a public works project [and includes the];

(2) removal of excavated materials from a public works project; or

(3) hauling materials on the site of the work.

DLI added the last clause to clarify that “truck hire” includes hiring a truck to use on the site of the work as well as to and from the site.[84]

138. The term “truck hire” is used in Minn. Stat. § 177.42, subd. 6, as follows:

"Prevailing wage rate" . . . includes, for the purposes of section 177.44, rental rates for truck hire paid to those who own and operate the truck.

The term is in one of the proposed rules. That is in what was a portion of Subp. 7. B. of the proposed rules and has been moved to what is now Subp. 8. C. of the Revised Rules. It provides:

C. The owner of a trucking firm may either drive the vehicles or hire employees to drive the vehicles. If the owner drives the vehicle, then the truck hire is subject to the truck rental rates. If the owner hires an employee to drive the vehicle, the truck hire is subject to the truck rental rates and the employee driver is subject to the appropriate prevailing wage rate.

139. The SONAR states that the definition of “truck hire” is necessary to clarify that the term truck hire includes the hiring of another’s truck, tractor, or tractor-trailer for the purpose of delivering materials to or from a public works project to eliminate any confusion as to which drivers are to be paid prevailing wage. It is in response to comments during Advisory Committee meetings where it is was suggested that a driver hired to pull another company’s trailer might not be an independent owner-operator under the meaning of the law because the driver did not own the trailer that was being pulled. This would allow a company to avoid the intent of the MPWL by simply hiring drivers to pull company trailers to escape paying prevailing wage rates. In DLI’s view hauling is included in “work under the contract” whether it is done by a driver that owns the truck and the trailer or by a driver that is hired to pull a trailer that is owned by another company.[85]

140. The meaning of “truck hire” is clear enough from its context in Minn. Stat. § 177.42, subd. 6, and Subp. 8. C. It is not necessary to define it.

141. Nonetheless, DLI has demonstrated that it is necessary to have a provision covering the situation of the trailer owned by a different company. That can be accomplished in a more understandable way by adding a sentence to the end of

Subp. 8. C. (Revised) to the effect of, "These provisions apply regardless of who owns any trailer being pulled by the truck."

142. Likewise, adding the "hauling materials on the site of the work" language is misplaced and confusing. Subp. 2, the definition of "work under the contract," refers to required hauling activities to or from a public works project. It would seem to be fairly implied that hauling entirely on the site is included under "all construction activities," but some people might argue otherwise. Thus, a clarification is necessary, but it should be made to the clause in Subp. 2, such as:

> . . . any required hauling activities <u>on the site of</u> or to or from a public works project . . .

143. DLI has failed to demonstrate that Subp. 5. B. is necessary or reasonable. To correct this defect, it must be deleted. The language changes suggested in the previous two findings may be added to Subparts 2 and 8. C.

Subp. 5. C. Own and operate

144. Subp. 5. C. provides definitions of "own" and "operate" These terms relate to the clause in Minn. Stat. § 177.42, subd. 6, that requires payment of a truck rental rate to those who own and operate the truck that was hired. The proposed rule states:

> C. "Own" and "operate" have the following meanings and apply to independent truck owner-operators and trucking firms. The notation "truck owner-operator" for the purposes of this part will apply to both the independent owner-operator and trucking firms unless otherwise defined:
>
> (1) "Own" means to have a legal and rightful title to the vehicle or to have an approved lease on the vehicle.
>
> (2) "Operate" means the owner either physically drives the vehicle or hires another to physically drive the vehicle but maintains the right to direct the day to day operations of the vehicle.

145. According to the SONAR, this definition is necessary to clarify that a truck owner who hires another to operate the truck, but who maintains the right to direct the day to day operations of the truck, is the same under the statute as a truck owner who operates the truck himself. The definition also makes clear that this statutory term applies to trucking firms as well as independent truck owners.

146. As found above in the Findings on Part 5200.1105, the Departments' interpretation of "those who own and operate the truck," is reasonable because it is consistent with the language of Minn. Stat. § 177.42, subd. 2, and also the purposes of the MPWL.

147. Subp. 5. C. is necessary and reasonable. However, the Administrative Law Judge suggests that it would be better located somewhere other than in the subpart containing definitions related to the Commercial Establishment Exception and Incorporated into the Work Exception. It would make more sense in Subp. 7, which contains other definitions related to truck ownership. The title of Subp. 7 would have to be changed, perhaps to "Trucking definitions."

Subp. 6. Definitions of contract, bona fide lease, prime contractor, contractor, employee driver, and temporary plant

148. In the Revised Rules, DLI changed the introduction to Subp. 6 as follows:

> Subp. 6. **[Definition] Definitions of contract, prime contractor, contractor, employee driver, and temporary plant.** The following terms have the meanings given them for purposes of [this part except where the context clearly indicates that a different meaning is intended] parts 5200.1105 and 5200.1106 and Minnesota Statutes, sections 177.41 to 177.44.

Subp. 6. A. Contract

149. In the Revised Rules, DLI changed Subp. 6 A. as follows:

> A. "Contract" means the written instrument containing [the elements of offer, acceptance, and] consideration and the terms of agreement between the prime contractor and the contracting agency for the construction of all or a part of:
>
> (1) a highway pursuant to Minnesota Statutes, sections 161.32 and 177.44;
>
> (2) a public works project pursuant to Minnesota Statutes, section 177.43 and chapter 16B; or
>
> (3) any public building or public works financed in whole or in part with state funds pursuant to Minnesota Statutes, sections 177.41 to 177.44.
>
> Contract includes project proposals, plans, and specifications, and all requirements for labor, equipment, and materials found in such proposals, plans, and specifications.

150. It is necessary to define this term because it is central to the application of the MPWL and has a technical meaning in the field of public construction contracts. The proposed rule is reasonable because it uses the commonly recognized definition of the term in the area of public works. As suggested in the Findings related to Subp. 2, this and the next two items would be better located in Subp. 2.

Subp. 6. B. and C. Prime contractor and contractor

151. In the Revised Rules, DLI made the following nonsubstantial changes to Subp. 6 B. and C.:

> B. "Prime contractor" means an individual or business entity [which] that enters into a contract as defined in item A with the contracting agency.
>
> C. "Contractor" means an individual or business entity [which] that is engaged in construction or construction service-related activities including trucking activities either directly or indirectly through a contract as defined by item A, or by subcontract with the prime contractor, or by a further subcontract with any other person or business entity performing work under the contract.

152. These rules are necessary to make clear that the term contractors includes prime contractors as well as subcontractors, because some would recognize only the contractor that actually signs the contract with the public contracting agency as a contractor.[86] This definition would severely limit the application of the proposed rule.

153. Although this rule defines "contractor" to include "subcontractor," the MPWL and most of the other rules continue to use both terms in several places. That is not a serious problem. Revised Subp. 6 B. and C. are necessary and reasonable.

Subp. 6. D. Employee Driver

154. Proposed Subp. 6. D. states:

> D. "Employee driver" is a person hired directly or indirectly to physically drive another's owned, rented, or leased vehicle.

155. The SONAR claims that it is necessary to define this term and provide a consistent understanding of its meaning and to differentiate between owner operators, who are not required to be paid truck rental rates during certain down times on the job site, and employee drivers, who are required to be paid the prevailing wage rate while on the project site, even during down times. It also claims that the definition is reasonable because it uses the common meaning of the term.[87]

156. Using the common meaning of the term indicates that a definition is not necessary. The term "employee driver" is only used in what is now Subp. 8 C. in the Revised Rules as follows:

> If the owner hires an employee to drive the vehicle, the truck hire is subject to the truck rental rates and the employee driver is subject to the appropriate prevailing wage rate.

The meaning of "employee driver" is clear in the context of Subp. 8. C. Therefore, it does not need to be defined. Subp. 6. D. is not necessary and must be deleted.

Subp. 6. E. Temporary plant

157. Proposed Subp. 6. E. states:

> E. "Temporary plant" is one that is portable in nature and in addition, uses any or all of the following: temporary supports, portable power supplies, portable water supplies, portable oil tanks, portable scales, or other portable buildings or structures to facilitate the production of the given product.

158. According to the SONAR, it is necessary to have this definition in the proposed rule to distinguish between permanent production plants, which qualify as commercial establishments with "a fixed place of business from which they regularly supply processed or manufactured materials or products," and portable plants, which do not.

159. The only reference to "temporary plants" in the rules is in Subp. 3. B., which talks about temporary asphalt or concrete plants and specifically refers to this definition. Unless DLI intends to add more rules relating to other types temporary plants someday, this provision would be better located at the end of Subp. 3. B.

160. According to ARM, the definition of "temporary plant" included in Subpart 6E is simply not a workable definition and would result in the vast majority of hot mix asphalt plants and many ready mix concrete plants being considered "temporary plants." ARM thinks the focus on the production equipment is misplaced and should be in terms of temporal measurements rather than the type of production equipment being used. They go on to state:

> The simplest definition would be one which focused on the fact that the production equipment is dedicated to the project. If the production equipment is temporary but supplies the project as well as many other customers, the employees operating the production equipment should not be covered. Because the definition of "temporary plant" contained in Subpart 6E is an essential element of Subpart 3B, Subpart 3B is equally unworkable. Better language for Subpart 3B might be as follows:
>
> > Work performed by employees of a contractor or subcontractor that operates a temporary asphalt or concrete plant that was moved into a gravel pit or borrow pit that meets the definition of commercial establishment which temporary asphalt or concrete plant was moved into the gravel pit or borrow pit exclusively to serve the project is considered work under the contract and the employees must be paid at appropriate prevailing wage rates.[88]

161. The Administrative Law Judge agrees. Unless all the product from a temporary hot mix asphalt or concrete plants goes to state-funded projects, there is no justification for requiring all the work done at the plant to be subject to prevailing wage. Further, DLI's proposed definition essentially defines "temporary" to mean "portable." They are not the same. Even though a plant may be portable, it still may be used at a

fixed place of business on a permanent basis. The rules recognize this possibility with washing and other machines in Subp. 4. B. Why asphalt and concrete plants should be treated differently has not been explained. DLI has justified this rule by stating that the Legislature intended to apply prevailing wage requirements to temporary plants. But the proposed rule goes far beyond just temporary plants.

162. DLI has failed to demonstrate that Subp. 6. E. is necessary and reasonable. To correct the defect, Subp. 6 E. must be modified, such as:

> E. "Temporary plant" is one that is moved into a gravel pit or borrow pit primarily to serve the project.

In the alternative, Subp. 6. E. could be deleted and Subp. 3. B. modified such as follows:

> B. Work performed by employees of a contractor or subcontractor that operates an asphalt or concrete plant that was moved into a gravel pit or borrow pit primarily to serve the project is considered work under the contract, including the contractor's employees loading the equipment hoppers with materials obtained from the pit, regardless of whether the pit meets the definition of commercial establishment.

Subp. 7. Definition of independent truck owner operator, trucking firms, truck brokers

Subp. 7. A. Independent truck owner-operator

163. In the Revised Rules, DLI made nonsubstantial changes to this rule as follows:

> A. "Independent truck owner-operator" is an individual, partnership or [sole] principal stockholder of a corporation who owns or holds a vehicle under lease and who contracts that vehicle and the owner's services to an entity which provides construction services to a public works project. In addition, [a sole] an owner and operator of a vehicle that is licensed and registered as a truck, tractor, or truck-tractor by a governmental motor vehicle regulatory agency is an independent contractor, not an employee, only if each of the following factors are significantly present:
>
> (1) the individual, partnership or corporation owns the equipment or holds it under a lease arrangement;
>
> (2) the individual, partnership or corporation is responsible for the maintenance of the equipment;
>
> (3) the individual, partnership or corporation bears the principal burden of the operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road, but not including brokerage fees;

(4) the sole owner drives the equipment;

(5) the sole owner determines the details and means of performing the services in conformance with regulatory requirements, operating procedures, and specifications of the entity with which the individual or corporation contracts; and

(6) the individual or corporation enters into a legally binding agreement that specifies the relationship to be that of an independent contractor and not that of an employee.

164. It is necessary to have a definition because "independent truck owner-operator" is a term with particular meaning in trucking and to differentiate between an independent truck owner-operator and an employee driver because they are treated differently by the MPWL. The proposed rule incorporates the business forms that ITOs commonly use and the factors commonly used to determine independent contractor status. It is reasonable.

Subp. 7. B. Trucking firms

165. DLI revised Subp. 7. B. as follows:

B. "Trucking firm" is any legal business entity that owns more than one vehicle and hires the vehicles out for services to brokers or contractors on public works projects. [The owner may either drive the vehicles or hire employees to drive the vehicles. If the owner drives the vehicle, then the truck hire is subject to the truck rental rates. If the owner hires an employee to drive the vehicle, the truck hire is subject to the truck rental rates and the employee driver is subject to the appropriate prevailing wage rate.]

The last sentence was moved to Subp. 8 and will be discussed below.

166. It is necessary to define this term because it is used in Subp. 8 and is not clear on its face. The definition is reasonable.

Subp. 7. C. Trucking broker

167. As discussed in the Findings regarding Part 5200.1105, a truck broker service fee is now included in the truck rental rate to more accurately reflect all costs involved in operating trucks on public works projects. Therefore, a definition of truck broker is necessary. In the industry, a truck broker provides the set of services listed in the proposed rule, and may also own trucks. Therefore, the rule is reasonable.

Subp. 7. D. and E. Moved to Subp. 8

Subp. 8. Trucking provisions

168. In the Revised Rules, DLI moved the last two sentences of Subp. 7. B. and Subp. 7 D. and E. to a new Subp. 8. This was done to separate the definitions from

the operative requirements of those rules. No substantive changes were made. The new Subp. 8., states:

> A. Independent truck owner-operators or the owner-driver of a trucking firm are not required to be paid the truck rental rate for:
>
> (1) time spent repairing or maintaining, or waiting to repair or maintain, the truck owner-operator's equipment, except that repair, maintenance, or time spent waiting to load or unload which is attributable to the fault of the broker, contractor, agent thereof, or an employee of such entities, must be included in the hours worked and paid the hourly truck rental rate; and
>
> (2) time spent correcting work, which was not performed according to the prime contract that can be directly contributed to the negligence of the truck owner-operator.
>
> B. Employees of a trucking firm must always receive the appropriate prevailing wage rate for any work performed under the contract.
>
> C. The owner may either drive the vehicles or hire employees to drive the vehicles. If the owner drives the vehicle, then the truck hire is subject to the truck rental rates. If the owner hires an employee to drive the vehicle, the truck hire is subject to the truck rental rates and the employee driver is subject to the appropriate prevailing wage rate.

169. Subp. 8. A. is necessary to clarify that the truck rental rate is not required to be paid for certain down times which are not the fault of the contractor, broker or other entity that hired the truck, but the fault of the truck owner. If a truck owner fails to maintain his truck and it breaks down on the job site, the truck owner is not required to be paid the truck rental rate for the time spent repairing the truck. It is reasonable to exclude the time spent maintaining the truck from the requirement that the truck hire be paid the truck rental rate because the truck owner is responsible for the condition of the truck. This subpart also reasonably requires that the contractor be responsible for equipment problems caused by conditions on the job site.

170. Subp. 8. B is necessary to make clear that all employees of trucking firms must always be paid the prevailing wage while working on covered public works projects and that there are no exceptions.

171. Subp. 8. C. further clarifies the intent of the rules to require uniform payment of the truck rental rates to all trucks hired to work on public works contracts. This is necessary to ensure that payment of the truck rental rate can not be circumvented by purchasing two or more trucks and paying the employee drivers the prevailing wage rate while reducing the cost of the trucks they drive by charging a rate lower then the truck rental rate.

172. DLI has demonstrated that Subp. 8 is necessary and reasonable and not a substantial change.

Subp. 9 (formerly 8) Required records

Subp. 9. A. Records to be kept

173. In the Revised Rules, Subp. 9. A. was amended as follows:

Subp. [8.] 9. **Required records.**

A. [Each time] Upon agreement of a contractor or trucking broker [enters into an agreement] with an independent truck owner-operator to perform work under the contract, the contractor or broker must keep the following records for a period of at least six years following the payment for services:

(1) name, address, and social security number of the truck owner-operator;

(2) name, address, and phone number of the truck owner-operator's business and federal tax identification number;

(3) time period covered by the agreement between the truck owner-operator and the broker or contractor;

(4) date and amount [paid] of each payment to the truck owner-operator, [including the date and amount of] and for each payment[;]:

[(4) time period covered by the agreement between the truck owner-operator and the broker or contractor;]

[(5)] (a) number of hours the truck owner-operator performed work under the contract, not including hours excluded under subpart [7] 8;

[(6)] (b) type of trucking equipment used for each job by the truck owner-operator and if leased, the name and address of the individual or business entity which owns the equipment;

[(7)] (c) type of services performed;

[(8)] (d) hourly truck rental rate used to calculate the minimum payment due; and

[(9)] (e) an itemization of any deductions from the gross amount payable to the truck owner-operator;

[(10)] (5) a copy of the operator's commercial driver's license;

[(11)] (6) a yearly certified copy of the operator's driving record;

[(12)] (7) a copy of the owner's certificate of insurance; and

[(13)] (8) a copy of the vehicle/truck registration.

The contractor or broker must also keep the same records for owner-drivers of trucking firms working on the public works project unless the owner-drivers' information is submitted along with the employee information to a contracting agency as listed under subpart [9] 10.

174. It is necessary and reasonable to require contractors and brokers to maintain records sufficient to demonstrate compliance with the MPWL. According to the SONAR, the Departments have attempted to require only those records that are necessary to verify that the truck owner-operator is valid. The proposed rule requires truck brokers to keep the same records required of MTOs by state statute and federal regulations. The proposed rule requires only those records that are already required to be kept under the Federal Davis Bacon Act for contractors performing on a federal aid project, and therefore should not increase the record keeping burdens on contractors.[89]

175. Most motor carriers are required to submit similar information to obtain a certificate or permit from Mn/DOT. But many deliveries covered by these rule fall under the 50 mile radius exception of Minn. Stat. § 221.025(h). Small businesses that come within that exception, such as Bowman Construction of International Falls, feel that the record keeping requirements are excessive and unnecessary. They feel the impact of the increased costs will cause local units of government to do less work, making less work available for small, local contractors and their employees.[90]

176. ARM objects to the cost of producing the records and states that the costs of doing so are far beyond anything previously required. Those costs, they say, will require many ARM members to re-examine how they do business with the State and will cause significant cost increases to their customers, the State and local governments.[91]

177. The Minnesota Trucking Association also believes the requirements are excessive, might change the status of ITOs to employees, and that safety and performance are not within the scope of the MPWL.[92]

178. Subp. 9. A. (1)–(4) are records required to identify the truck owner-operators and to confirm that the amounts paid to the truck owner-operators were at the appropriate truck rental rates for the types of service and equipment provided and for the appropriate lengths of time. Therefore it is reasonable to require that these records be kept so that enforcement of the MPWL is based upon the actual work performed.

179. According to the SONAR, the records listed in Subp. 9. A. (5) – (8) are items truck brokers should have to ensure that the operator is in compliance with state law and because they are items required for trucks to drive on Minnesota roadways. The SONAR also states that the records are used to verify that the person that owns the truck is also the person that operates the truck. Finally, the SONAR states that the public works contracts require that contractors and subcontractors abide by all state and

federal regulations, so it is reasonable to require the information to ensure compliance with state and federal law, and to protect the safety on Minnesota roadways.[93]

180. Aiding enforcement of other state and federal laws is beyond the scope of these rules. In this proceeding, the only relevant justification for requiring records to be kept is that the records will assistant enforcement of the MPWL. In fact, the scope of the records DLI may require is prescribed by statute. Minn. Stat. § 177.43, Subd. 6, states:

> **Examination of records.** The department of labor and industry shall enforce this section. The department may demand, and the contractor and subcontractor shall furnish to the department, copies of any or all payrolls. The department may examine all records relating to wages paid laborers or mechanics on work to which sections 177.41 to 177.44 apply.

Minn. Stat. § 177.44, Subd. 7, contains a similar provision that applies to Mn/DOT. Thus, DLI is limited as to what it can ask for in the way of records, which, of course, limits the records it can require to be kept. Since the requirement for the payment of the truck rental rate has been added to the MPWL, it can fairly be implied that DLI may inspect and require the keeping of records necessary to demonstrate compliance with that aspect of the MPWL as well.

181. Copies of the owner's certificate of insurance and the vehicle/truck registration will help verify the ownership of the vehicle and whether that person is the driver. That is relevant to enforcement of the MPWL. But that is not the case with the driver's license or the driving record. DLI has failed to demonstrate that Subp. 9. A. (5) and (6) are necessary. To correct this defect, they must be deleted. Otherwise, DLI has demonstrated that Subp. 9. A. is necessary and reasonable.

Subp. 9. B. Records provided upon request

182. Revised Rule Subp. 9. B. provides:

> B. Records and other records deemed appropriate by the [commissioners] commissioner of the Department of Transportation or the Department of Labor and Industry or the contracting agency, must be provided upon request accompanied by a certification form approved by the requesting agency.

183. Apparently the first word was intended to refer to, "Records required to be kept by Subp. 9. A." The rule should be revised to say so more clearly.

184. Regarding the "other records deemed appropriate," according to the SONAR, this rule is necessary to allow the Commissioners of Labor and Industry and of Transportation to request additional information to ensure compliance with the prevailing wage rates and is reasonable because it is impossible to foresee the need for additional information that is not contained in the requirements listed in Subp. 9. A. in every situation.[94]

185. This rule creates unbridled discretion in DLI, Mn/DOT, and other government agencies to ask for whatever they want. It contains no standards limiting that discretion. It is illegal on that basis. It is also contrary the to limits on what records may be demanded by DLI and Mn/DOT set forth in Minn. Stat. §§ 177.43, subd. 6, and 177.44, subd. 7. In addition, this rule attempts to grant authority to other contracting agencies to demand records. DLI has not cited any legal authority in the MPWL authorizing other contracting agencies to demand such information or authorizing DLI to grant such authority. The MPWL does not grant other contracting agencies any enforcement authority. They may have such authority under the public contracting or other statutes, but it is beyond DLI's authority to grant enforcement powers to other entities under the MPWL. For all these reasons, Subp. 9. B. is illegal.

186. To correct the defects found in the preceding Finding, the phrase, "and other records deemed appropriate by the commissioner of the Department of Transportation or the Department of Labor and Industry or the contracting agency," must be deleted. In the alternative, a phrase without the reference to other contracting agencies and with appropriate standards could be used, such as:

> B. Records required to be kept by Subp. 9. A. and other similar records necessary to determine compliance with Minnesota Statutes, sections 177.41 to 177.44, as determined by the commissioner of the department of transportation or the department of labor and industry, must be provided upon request and accompanied by a certification form approved by the requesting department.

Subp. 10 (formerly 9). Required employee records

187. In the Revised Rules, DLI renumber Subp. 9 as Subp. 10 and changed it to read as follows:

> Subp. [9] 10. **Required employee records.** Records pertaining to the proper payment of employees including, but not limited to, fringe benefit documentation, time cards, payroll ledgers, check registers, and canceled checks will be made available on request from the agency for further review to determine if the employee was paid according to this part and Minnesota Statutes, sections 177.41 to 177.44. [Additionally, if] If the contracting agency requests any or all of the following information, the contractor, subcontractor, or trucking firm[s] shall submit the following information to the agency [accompanied by] together with any certification forms approved by the requesting agency:
>
> A. name, address, and social security number of the employee;
>
> B. the classification of work performed defined by part 5200.1100, master job classification;
>
> C. the hours worked per day and per week;
>
> D. legal deductions made from the employee's check;

E. contract information [surrounding] regarding the public works projects worked [during the pay period] on by the employee;

F. hourly rate of pay, including any fringe benefit information deemed necessary to determine if the proper prevailing wage rate was paid;

G. project gross amount earned;

H. weekly gross and net amount of payroll check; or

I. in the case of the owner-driver, information described in items A to E shall be submitted along with the hourly truck rental rate paid to the owner-driver.

188. The records listed are those required to determine compliance with the MPWL. To that extent, the rule is necessary and reasonable. However, this rule allows other contracting agencies to demand records. Nothing in the MPWL authorizes DLI to grant such authority. Therefore, that aspect of the rule is beyond DLI's statutory authority and is illegal. Those provisions must be rewritten to refer only to DLI and Mn/DOT.

Effective date

189. Several parties commented on the need for an effective date provision. For example, Todd Goderstad of Ames Construction states that the failure to provide a date certain for an effective date and whether the rules will apply to existing bids and contracts will certainly invite litigation.[95]

190. In its post-hearing comments, DLI responded to similar comments as follows:

> A transition rule or special effective date provision was suggested by Mr. Bolander. The rules will apply only prospectively. MnDOT has conducted case by case enforcement under the terms of the statute prior to and during this rulemaking. Truck rental rates, which have been effectively stagnant because of the court injunctions, will be surveyed for and certified after the rules are effective and there will be no rental rates before that time. The impairment of contract defense has been noted and there is no indication that MnDOT would attempt any retroactive enforcement of the rates to contracts let before the truck rental rates are certified. There is no need demonstrated for a transition rule or special effective date provision for these rules.[96]

191. The absence of a transition rule does not make the entire set of rule unreasonable, so DLI can not be required to adopt one. While some of the language of DLI's comment is qualified and noncommittal, it appears they are saying that the new rules will apply to bids made after the effective date of the rules, except that truck rental rates won't be effective for bids until after those rates are determined. If the Department had proposed a rule with earlier effective dates, it likely would have been found to be illegally retroactive and unreasonable. The Administrative Law Judge suggests that DLI

add an effective date provision to the rules. Agencies should be as clear as possible about the laws they enforce; nothing is accomplished by being coy.

192. Diane Vinge Sorenson of L & D Trucking W.B.E., Inc., makes a number of suggestions on the steps that Mn/DOT should take when the rules are adopted.[97] Most of those relate to providing information about the rules with bid forms and in other forums. The Departments should consider those suggestions.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. DLI gave proper notice of the hearing in this matter.

2. DLI has fulfilled the procedural requirements of Minn. Stat. §§ 14.14 and 14.15.

3. Except as noted in the Findings, DLI has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. Except as noted in the Findings, DLI has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii).

5. The additions and amendments to the proposed rules that were suggested by DLI after publication of the proposed rules in the State Register do not result in rules that are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. The Administrative Law Judge has suggested action to correct the defects noted in the Findings.

7. Due to Findings that DLI has exceeded its statutory authority for certain rules and failed to demonstrate the need for and reasonableness of certain rules, this Report has been submitted to the Chief Administrative Law Judge for approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings that might properly be termed Conclusions are hereby adopted as such.

9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage DLI from further modification of the rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be revised as suggested and adopted.

Dated this 30th day of January, 2001

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STEVE M. MIHALCHICK
Administrative Law Judge

Recorded, 9 tapes, Unofficial Transcript Prepared[98]

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[1] Ex. Q.
[2] Ex. G.
[3] Ex. H.
[4] Ex. O.
[5] Ex. A.
[6] Ex. C.
[7] Ex. D.
[8] Ex. E.
[9] Ex. F.
[10] Ex. G.
[11] Ex. H.
[12] Ex. I.
[13] Ex. L.
[14] Ex. M.
[15] Ex. N.
[16] Ex. O.
[17] Ex. P.
[18] Ex. Q.
[19] Ex. D, SONAR, at 30.
[20] Ex. D, SONAR, at 4.
[21] Ex. 195 at 2-3.
[22] Ex. D, SONAR, at 4-27.
[23] Ex. D, SONAR, at 1-3.
[24] Minn. Stat. § 177.41.
[25] Ex. D, SONAR, at 37.
[26] Ex. D, SONAR, at 37.
[27] Minn. R. 5200.1040 and 5200.1100.
[28] The parallel provision in Minn. Stat. § 177.43, subd. 2, is substantively identical. It states: "**Exceptions.** This section does not apply to wage rates and hours of employment of laborers or mechanics who process or manufacture materials or products or to the delivery of materials or products by or for commercial establishments which have a fixed place of business from which they regularly supply processed or manufactured materials or products. This section applies to laborers or mechanics

who deliver mineral aggregate such as sand, gravel, or stone which is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle."

[29] Ex. D, SONAR, at 31.
[30] Minn. Stat. § 645.06(2).
[31] Ex. T.
[32] Ex. 199 at 1-2.
[33] Minn. Stat. § 645.001.
[34] For readability and web page purposes, this report uses square brackets rather that strikeouts to indicates deletions.
[35] Ex. 195 at 5.
[36] Ex. D, SONAR, at 33.
[37] Ex. M at 21-24
[38] Ex. M at 25-28, 38-41, 46-50, 62-67.
[39] Minn. Stat. § 177.41.
[40] Ex. M at 30-32, 352-357.
[41] Ex. 195 at 6.
[42] Ex. D, SONAR, at 34.
[43] Ex. D, SONAR, at 34.
[44] Ex. T at 13.
[45] Ex. 203 at 2.
[46] Ex. D, SONAR, at 34-35.
[47] Ex. 195 at 7.
[48] Ex. D, SONAR, at 35.
[49] Ex. D, SONAR, at 35.
[50] Ex. D, SONAR, at 36.
[51] Ex. D, SONAR, at 36.
[52] Ex. D, SONAR, at 36.
[53] Ex. D, SONAR, at 36-37.
[54] Ex. D, SONAR, at 37.
[55] Ex. T at 13.
[56] Ex. D, SONAR, at 37.
[57] Minn. Stat. § 177.44, subd. 2. The parallel provision in Minn. Stat. § 177.43, subd. 2, is substantively the same.
[58] Ex. D, SONAR, at 37.
[59] Ex. 201 at 1.
[60] Ex. 195 at 8.
[61] Ex. 201 at 2.
[62] Ex. D, SONAR, at 42.
[63] The insertion of a comma here appears to be unnecessary.
[64] Ex. D, SONAR, at 42.
[65] Ex. T. at 14.
[66] Ex. 201 at 2.
[67] Minn. Stat. § 177.44, subd. 2.
[68] Minn. Stat. § 177.43, subd. 2.
[69] Ex. 203 at 3.
[70] Ex. 196 at 3.
[71] Ex. D, SONAR, at 40.
[72] Ex. 203 at 3.
[73] Ex. D, SONAR, at 40-41.
[74] Ex. D, SONAR, at 40-41.
[75] Ex. D, SONAR, at 41.
[76] Ex. D, SONAR, at 41-42.
[77] Minn. Stat. §§ 177.43, subd. 2, and 177.43, subd. 2.
[78] Ex. 195 at 9.
[79] Ex. 201 at 6.

[80] Ex. D, SONAR, at 40.
[81] *SA-AG*, 447 N.W.2d at 4-5.
[82] Ex. D, SONAR, at 39.
[83] Ex. D, SONAR, at 39-40.
[84] Ex. T at 13.
[85] Ex. D, SONAR, at 38.
[86] Ex. D, SONAR, at 43.
[87] Ex. D, SONAR, at 43.
[88] Ex. 203 at 2.
[89] Ex. D, SONAR, at 45.
[90] Ex. 142.
[91] Ex. 195 at 11.
[92] Ex 149.
[93] Ex. D, SONAR, at 47.
[94] Ex. D, SONAR, at 47.
[95] Ex. 151.
[96] Ex. T at 4.
[97] Ex. 194 at 23-24.
[98] Ex. S.